SAVRIMUTHU SINNAPAN

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
ABDUL HAMID OMAR CJ (MALAYA)
HASHIM YEOP SANI SCJ
[CRIMINAL REFERENCE NO. 2 OF 1986]
1 DECEMBER 1986

CRIMINAL LAW AND PROCEDURE: *Public Prosecutor's requisition to transfer case from Sessions Court to High Court - Sections 39B, 41 of Dangerous Drugs Act 1952 - Whether contrary to Article 7(1) of Federal Constitution - Whether s. 417 of Criminal Procedure Code applicable.*

The applicant was charged in the Sessions Court at George Town, Penang under s. 39B of the Dangerous Drugs Act 1952 ("the Act"). The Public Prosecutor gave his consent under subsection (3) of s. 39B of the Act. The prosecution later tendered the Public Prosecutor's requisition under s. 41(2) of the Act, with a view to transfer the case to the High Court. The learned President refused to transmit the case. The Public Prosecutor appealed to the High Court.

During the course of the appeal Mr. Karpal Singh's application to refer the matter to the Supreme Court under s. 48(1) of the Courts of Judicature Act was allowed.

The question posed to the Supreme Court was:

> Whether for the purpose of Article 7(1) of the Federal Constitution an accused person derives a vested right when (1) he is charged, or (2) after his trial has commenced.

Held:

[1] Pending drug cases could still be tried in the Sessions Court unless a requisition is issued under s. 41(2) of the Act. "Pending cases" means existing cases before the amendments to the Act.

[2] The Public Prosecutor's requisition is effective only if the trial has not commenced in the Sessions Court. The trial is said to have commenced when evidence has begun to be taken.

[3] Section 417 of the Criminal Procedure Code is ineffective in cases where a requisition is issued under s. 41(3) of the Act.

[4] The transmission of pending cases to the High Court is not in violation of Article 7(1) of the Federal Constitution.

[Question posed answered in the negative.]

Cases referred to:
PP v. Hun Peng Khai [1984] 2 MLJ 318
PP v. Cheah Cheng Eng [1986] CLJ Rep) 212

Legislation referred to:
Courts of Judicature Act 1964, s. 48(1)
Criminal Procedure Code s. 417
Dangerous Drugs Act 1952, s. 39B, (3), 41(2), (1), (3), 41A
Dangerous Drugs (Amendment) Act 1983, s. 39B

Federal Constitution, art. 7(1), (2)
Interpretation Act 1967, s. 30

For the applicant - Karpal Singh (V. Sithambaram and San Markan Ganapathy with him); M/s. Karpal Singh & Co., M/s. Farid Ariffin & Associates, M/s. Kumar & Co.
For the public prosecutor - Mohd. Noor b. Hj. Ahmad, DPP

JUDGMENT

Salleh Abas LP:

This is a reference under s. 48(1) of the Courts of Judicature Act made by Dzaiddin J at the instance of Mr. Karpal Singh's application on behalf of the applicant:

The facts are as follows:

The applicant was charged in the Sessions Court at George Town, Penang on 7 October 1982 with an offence under s. 39B of the Dangerous Drugs Act 1952, which, it was alleged, was committed by him the previous day. On 25 April 1983 the Public Prosecutor's consent under subsection (3) of s. 39B was tendered and the Court proceeded to fix the date of hearing. Subsequently, on 21 June 1984 the prosecution tendered the Public Prosecutor's requisition under s. 41 subsection (2) with a view to have the case tried by the High Court, However, the learned President of Sessions Court refused to transmit the case to the High Court, being of the view that the applicant had acquired a vested right to be tried in the Sessions Court once the Public Prosecutor had indicated his election to have the trial held in that Court by tendering his consent to prosecute. From this decision the Public Prosecutor appealed to the High Court.

During the course of the hearing of the appeal Mr. Karpal Singh urged Dzaiddin J to refer the matter to the Supreme Court under s. 48(1) of the Courts of Judicature Act on two grounds: First, the decision of the Federal Court in *PP v. Hun Peng Khai* [1984] 2 MLJ 318 is in conflict with that of the Supreme Court in *PP v. Cheah Cheng Eng* [1986] CLJ (Rep) 212; secondly, the transmission of the case to the High Court is contrary to the provision of Article 7(1) of the Constitution which ensures protection to the applicant against any greater punishment than that which is prescribed by law at the time the alleged offence was committed.

Hence, the learned Judge stayed the proceedings and referred the matter to us with the following question:

> Whether for the purpose of Article 7(1) of the Federal Constitution an accused person derives a vested right when(1) he is charged, or (2) after his trial has commenced.

Before dealing with this question, we should first deal with the question whether the Federal Court's decision and that of the Supreme Court in the two cases referred to above are in any way in conflict with each other.

These two cases deal with the jurisdiction of the Sessions Court to try cases involving offences under s. 39B which have been pending for trial before that Court prior to the coming into force of the Dangerous Drugs(Amendment)Act 1983 - in this judgment for the sake of brevity such pending cases to be referred to as "pending cases" and the Dangerous Drugs (Amendment) Act 1983 as "the amendments".

Before the amendments offences under s. 39B were punishable with either death or life imprisonment plus strokes of rattan and the Sessions Court had jurisdiction to try all offences under the Act including offences under s. 39B and could impose full punishment prescribed

for such offences extent death sentence (s. 41(1)). The High Court, however, could also try these offences if the Public Prosecutor so requires by issuing a requisition, which according to subsection (2) and (3) shall have effect, notwithstanding anything to the contrary in any written law. Beside enabling the High Court to try these offences as the Court of first instance, another effect of the Public Prosecutor's requisition is to do away with the preliminary enquiry which is normally required under the Criminal Procedure Code for all High Court criminal trials. Thus, s. 41A makes a provision to the effect that once a Public Prosecutor's requisition is tendered before an appropriate subordinate Court before which the case is pending, no preliminary enquiry is to be held and the case has to be transmitted straightaway to the High Court which will then make the necessary arrangement for trial of the case.

As a result of the amendments offences under s. 39B are now made punishable with death only, the alternative sentence of life imprisonment and strokes being abolished. Whilst it is clear that all cases of offences under s. 39B are to be tried in High Court, the amendments make no transitional provision regarding pending cases before the Sessions Courts throughout the country. Since the punishment for offences under s. 39B is now death, a question arose whether pending cases in the Sessions Court before the amendments could no longer be tried by this Court, but by the High Court.

This question was first answered by Shaik Daud J in *PP v. Jusoh bin Samah* (Kuantan Criminal Trial Nos. 4 & 9 of 1984). In a judgment (unreported) the learned Judge held that the Sessions Court could no longer have jurisdiction to try such cases. In his view since the amendments made no provision for transitional matters the legislature must have intended the law to be retrospective. Hence he brushed aside the argument of the Public Prosecutor that these pending cases fell to be governed under the old law by virtue of s. 30 of the Interpretation Act.

Relying upon this judgment, President of the Sessions Court, Penang on his own motion transmitted three cases of offences under s. 39B to the High Court for trial by that Court, but upon a revision Edgar Joseph Jr. J held that the transmission to the High Court was invalid. In the course of his written judgment he expressed a contrary view to that of Shaik Daud J and gave three grounds for sending down the three transmitted cases back to the Sessions Court.

These were-

(1) the amendments are not retrospective. Therefore such cases are still have to be disposed of under the law prior to the amendments;

(2) Since the accused has been charged and the date of hearing in the Sessions Court fixed, he acquires a "vested right" to be tried by that Court;

(3) in any case the transmission to the High Court was invalid because this was not made upon the Public Prosecutor's requisition.

The learned Judge went on further and said that even assuming that his view on the three grounds stated above is erroneous and that the amendments have retrospective effect, the transmission to the High Court will still be invalid because it will be contrary to Article 7(1) of the Federal Constitution as the accused will be liable to a greater punishment than that prescribed by law at the time of the commission of the offence.

This judgment came by way of a reference before the Federal Court (see *PP v. Hun Peng Khai and Ors.* [1984] 2 MLJ). The Federal Court consisting of Abdul Hamid CJ, Hashim Yeop Sani and Abdoolcader FJJ agreed with the conclusion reached by Edgar Joseph Jr J, but

gave no written judgment. However, according to the editorial note appearing in the report the Federal Court ruled that the amendments (making death sentence mandatory for drug trafficking) do not apply to pending cases in the Sessions Courts before the amendments came into force on 14 April 1983. Consequently, the opinion of Shaik Daud J in *PP v. Jusoh bin Samah* was overruled.

One would expect that the Federal Court's decision should have settled the matter. However, the issue was raised again before Mustapha J in Alor Setar High Court and finally came before the Supreme Court consisting Abdul Hamid CJ, Mohd. Azmi and Syed Agil SCJJ (see *PP v. Cheah Cheng Eng* [1986] CLJ (Rep) 212).

What happened in that case is this: Following a requisition by the Public Prosecutor under s. 41(2), the President of the Sessions Court, Alor Setar transmitted a pending case before his Court to the High Court for trial. Subsequently, after hearing oral arguments of Counsel, Mustapha J re-transmitted the case down to the Sessions Court purporting to do so under s. 417 of the Criminal Procedure Code. On appeal by the Public Prosecutor, the Supreme Court held that the retransmission down was ineffective as s. 417 of the Criminal Procedure Code was not properly invoked upon a proper motion which should be supported by affidavits and that in any case the transmission to the High Court unlike in *PP v. Hun Peng Khai (supra)* was valid because it was done as a result of the Public Prosecutor's requisition and because the trial in the Sessions Court had not yet begun.

The Supreme Court also confirmed the view of the Federal Court in *PP v. Hun Peng Khai* (*supra*) that the Sessions Courts could still continue to try offences under s. 39B pending prior to the amendments unless the Public Prosecutor should choose to issue his requisition under s. 41(2) of the Act, a power he has been having even before the amendments. As to "vested right", the Supreme Court said that only when the trial had already commenced with at least one witness or more having been called would the accused be protected against having the case requisitioned and transmitted to the High Court. Thus cases which have only their dates of hearing fixed are still subject to transmission upon the issue of the Public Prosecutor's requisition.

Where is therefore a conflict between these two decisions? We see none at all.

In *PP v. Hum Peng Khai (supra)*, it is obvious that in confirming the conclusion reached by Edgar Joseph Jr. J on the question of the jurisdiction of the Sessions Court in respect of pending cases the Federal Court agreed with the view of the learned Judge that the amendments have no retrospective effect and that these cases should therefore be disposed of as if no amendments were made. The purpose of the reference to the Federal Court was only to resolve a conflict of opinion between Shaik Daud J and Edgar Joseph Jr J. The other two *ratio decidendi* given by Edgar Joseph Jr. J for saying that transmission to the High Court is invalid, namely "vested right" of the accused and the lack of the requisition by the Public Prosecutor, were left open by the Federal Court.

However, this gap was filled up by the Supreme Court in *PP v. Cheah Cheng Eng* (*supra*) in that whilst the Court confirmed the jurisdiction of the Sessions Court with regards to these pending cases the Supreme Court also said that these cases could be transmitted for trial by the High Court upon the issue of Public Prosecutor's requisition except only those cases in which trial has already commenced. Thus only in respect of the latter category of cases could one speak of "vested right". In other words despite the fact that originally any pending case was intended to be tried by the Sessions Court it does not follow that it must continue to be tried by that Court. To interpret the law to be otherwise would indeed render nugatory

the power of the Public Prosecutor to issue requisition under s. 41(2). We find nothing in the Act which prevents the Public Prosecutor from changing his mind if in his opinion public interest demands that any particular pending case be tried in the High Court rather than in the Sessions Court. No valid objection could really be sustained against the trial of these pending cases by the High Court merely because this Court has the power to impose death sentence, One must remember that with regards to these pending cases death sentence is not mandatory, but only discretionary. The Court may or may not impose such sentence, depending upon the circumstances of the case disclosed at the trial. This possibility of the High Court passing a death sentence cannot constitute a valid legal objection because this possibility has been there even before the amendments. It is not something new nor introduced by the amendments.

One must be wary of importing into the public law, such as criminal law, the concept of "vested right" which essentially belongs to the domain of private law. The use of terminology of "vested right" to refer to the extent of a subject's liability without appreciating the corresponding power of a public authority or the limitation upon it will lead to confusion. The point at issue is simply this: How far does the power of the Public Prosecutor to issue a requisition extend? Is it limitless or limited in some way? The Supreme Court has held previously that this power is not unlimited. It becomes inexercisable if the trial in the Sessions Court has commenced. Why is that so is not because the accused has a "vested right" but because public interest, reason and sense of justice demand that any statutory power must be exercised reasonably and with due consideration. Thus we think that although the Public Prosecutor can still issue a requisition to have those pending cases before the amendments tried by the High Court his requisition is invalid if it is issued in respect of cases of which the trial has already commenced. Thus the invalidity of the transmission is not due to the "vested right" of the accused but because the power of the Public Prosecutor has become inexercisable.

In *PP v. Hun Peng Khai* (*supra*), Edgar Joseph Jr. J has attempted to deal with the applicability of Article 7(1) of the Constitution on the matter of transmission of pending cases to the High Court. But the learned Judge clearly referred to this Article only as an alternative ratio on the assumption that his view on the non retrospective effect of the amendments would be erroneous.

However since the amendments by virtue of s. 30 of the Interpretation Act have no retrospective effect they have no effect upon pending cases and as such there is no necessity to resort to Article 7(1) at all, Punishment for offences in these cases remain the same as they were before the amendments and the power of the Public Prosecutor to issue requisition to transmit these cases to the High Court has existed even before the amendments. For the trial of these pending cases the law applicable is still the old law, i.e. the law before the amendments. The punishment prescribed for s. 39B offences in respect of pending cases are still death or life imprisonment as they were before. Thus, we cannot see how Article 7(1) of the Federal Constitution could apply under such circumstances, Perhaps the only relevancy of Article 7(1) is that the Article prevents the amendments from having a retrospective effect, i.e. from having effect upon pending cases and goes no further.

In view of our opinion that the Public Prosecutor can no longer issue a requisition once the trial has begun it becomes necessary for us to determine when or at what stage of the proceedings the trial can be said to have commenced. Mr. Karpal Singh, Counsel for the appellant, submitted that the commencement of the trial is at the stage when the accused, after the charge has been read and explained to him, claims to be tried. In other words, after

the plea is taken. The fixing of the date of the trial, he submitted is only an administrative arrangement. In our opinion, the question must be answered with reference to the practice that is now prevailing in the Courts throughout the country. Whilst we accept that the trial always begins with the reading of the charge and asking the accused to plead, it does not follow that the trial was commenced once the charge is read and the accused says he claims to be tried or even pleads guilty. It all depends upon the intention and understanding of the Court and the parties. The reading of the charge can be a mere matter of formality which is done as a matter of course without any intention to proceed to the trial yet. This happens on the mentioned date when the Court has to fix dates for the trial. But when on the trial date the charge is read, the plea is taken and the prosecution begins to lead evidence, the trial has certainly commenced, and it is commenced naturally with the reading of the charge and the taking of plea. The reading of the charge is not really the crux of the matter, because even at the continued hearing of part-heard cases the reading of the charge is as a matter of course automatically done. Thus in this context the commencement of trial must mean the commencement of the examination, cross-examination and re-examination of one or more witnesses.

In support of Mr. Karpal Singh's submission as to the limit of the power of the Public Prosecutor to issue a requisition, Mr. Sithambaram submitted that by virtue of s. 41A the Public Prosecutor could only issue the requisition after the accused is charged. With respect we find some difficulty in understanding the submission, because many other matters are dealt with after the accused is charged. Even the trial itself takes place after the charging. In any case we do not think that this section fixes the time when the Public Prosecutor should exercise his power. It is only a section which provides for a procedural requirement following the issue of the requisition, namely the bringing of the accused before the appropriate subordinate Court and sending up the case to the High Court for trial without holding any preliminary inquiry and this requirement applies when any case is "required by the Public Prosecutor to be tried by the High Court". And his power to make such requisition is not given to him by this section, but by s. 41, subsection (2).

Another point raised by Mr. Karpal Singh is that once the Public Prosecutor has elected to have the case tried in the Sessions Court by the issue of consent to prosecute and the Court has proceeded to fix the date of the trial, he can no longer exercise his power to issue the requisition. With respect we do not agree. The production of the accused and the charging of him before the Sessions Court, followed by the production of a Public Prosecutor's consent to prosecute and the filing of the date of hearing, all these do not mean that the Public Prosecutor has exercised his duties for the case to be tried in that Court so that he loses the power to have it tried by the High Court. All these are in fact done in order to confirm to the provision of subsection (1) because the Sessions Court is primarily the trial Court. In our opinion the submission is not justified by the wording of s. 41, subsection (2) which is:

> (2) Notwithstanding the provisions of subsection (1), the High Court shall have jurisdiction to try any case in respect of any offence under this **Act if the Public Prosecutor requires any such case to be tried by the High Court.**

There is nothing in this subsection which restricts the exercise of power by the Public Prosecutor in the manner submitted by Counsel. All that the subsection provides is that despite the fact that a Sessions Court or a Magistrate's Court is to be the trial Court, the High Court could also be the trial Court if the Public Prosecutor so chooses. In fact the wording of the subsection is so wide as to suggest that there is no limitation at all upon the

Public Prosecutor's power. But as we have said earlier no statutory power is without a limit and in this connection we are of the opinion that his power to issue a requisition ends after the trial has begun for it will no longer be reasonable for him to continue to exercise this power.

Mr. Ganapathy, the third Counsel for the applicant submitted that since the Public Prosecutor had given his consent to prosecute on 17 March 1983, it is not fair for him to transmit the case to the High Court. Here we are not in the position to assess and review the manner in which the Public Prosecutor exercises his discretion, as the law clearly leaves matters concerning the conduct of the prosecution to him as the guardian of public interest. Any complaint on this matter should be addressed to Parliament or to the appropriate Minister under whom he serves or to him personally and not to the Court unless it involves a constitutional issue.

Before concluding this judgment, we would like to make an observation regarding the relevancy of s. 417 of the Criminal Procedure Code to the pending case. In our view this section is irrelevant. It is not open to the High Court to whom a pending case has been validly transmitted on the Public Prosecutor's requisition to re-transmit it down even if an application under s. 417 is properly made by motion, in view of the clear wording of subsection (3) of s. 41, which enacts:

> The provision of subsections (1) and (2) shall have effect notwithstanding any other written law to the contrary.

Since the power of the Public Prosecutor to issue a requisition is governed by subsection (2) we can not think how it is open to the High Court to invoke any other law to remit down those cases to the Courts below.

In view of our opinion, we think that Article 7(1) of the Constitution does not arise at all and the question posed could best be answered in the negative.

For the guidance of Courts below, we would restate the matter as follows:

1. Pending cases could still be tried in the Sessions Court unless the Public Prosecutor chooses to have them tried in the High Court by the issue of a requisition under s. 41(2).
2. The Public Prosecutor's requisition is valid only in respect of cases of which trials have not yet begun. If trials have already commenced in the Sessions Court, his requisition is invalid and the Court therefore should continue to try them. The trial is said to have commenced when evidence has begun to be adduced.
3. If pending cases have been transmitted to the High Court pursuant to Public Prosecutor's requisition, it is not open to High Court to remit them to the Courts below by invoking s. 417 Criminal Procedure Code, or any other written law. Subsection (3) of s. 41 gives effect to the Public Prosecutor's requisition should prevail, this being a special law.
4. The transmission of pending cases to the High Court is not in violation of Article 7 (1) of the Constitution, as the punishment for which the accused is liable remains the same as it was before the amendments. Death penalty is not mandatory for such cases, but only discretionary.

Also found at [1987] 1 CLJ 368